Nos. 21310, 21313, 21314

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA GAS PRODUCERS ASSOCIATION, INDEPENDENT OIL AND GAS PRODUCERS OF CALIFORNIA, JADE OIL AND GAS COMPANY; THE STATE OF TEXAS; TEXAS INDEPENDENT PRODUCERS & ROYALTY OWNERS ASSOCIATION, WEST CENTRAL TEXAS OIL AND GAS ASSOCIATION, and PERMIAN BASIN PETROLEUM ASSOCIATION, *Petitioners*

v.

FEDERAL POWER COMMISSION,
Respondent

PACIFIC GAS TRANSMISSION COMPANY; PUBLIC UTILITY COMMISSIONER OF OREGON; SOUTHERN CALIFORNIA GAS COMPANY, SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA and PACIFIC LIGHTING SERVICE AND SUPPLY COMPANY; CITY AND COUNTY OF SAN FRANCISCO, *Intervenors*

On Petition to Review Orders of the
Federal Power Commission

REPLY BRIEF OF PETITIONERS TEXAS INDEPENDENT PRODUCERS & ROYALTY OWNERS ASSOCIATION, WEST CENTRAL TEXAS OIL AND GAS ASSOCIATION, AND PERMIAN BASIN PETROLEUM ASSOCIATION

JOHN DAVENPORT
902 International Life Building
Austin, Texas 78701
Attorney for above Petitioners

February 20, 1967

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INTRODUCTION

As in their initial joint brief, Petitioners, The Texas Independent Producers and Royalty Owners Association (TIPRO), West Central Texas Oil and Gas Association (WCTOGA), and Permian Basin Petroleum Association (PBPA) will confine their arguments to those issues deemed most crucial to these Petitioners. In the initial brief these Petitioners demonstrated that the Commission denied them due process by refusing to allow Petitioners the opportunity to present testimony on the issue of a cheaper and more dependable alternative supply of natural gas for Northern California (TIPRO, et al, Brief p. 3-4, 6-9). These Petitioners also contended that since the Canadian producer contracts to supply the proposed importation of gas were "open ended," *no* price could be established as the cost of the imported quantities (TIPRO, et al, Brief p. 11-13).

The briefs of the opposing parties, including the Commission's brief, have been directed to their contention that the alternative source suggested by the Petitioners may have a higher price than the price these Petitioners assume. Very little of the opposing briefs is directed to the question of the likelihood — almost a certainty — that the Pacific Gas Transmission supply will far exceed its assumed price as a result of the open-ended nature of 86 percent of the volume supplied by indefinite Canadian producer contracts.

I.

THE BRIEFS OF RESPONDENT AND INTERVENORS DO NOT ANSWER PETITIONERS' CONTENTION THAT THE REFUSAL OF THE COMMISSION TO ISSUE THE REQUESTED SUBPOENA DENIED THEIR RIGHT TO A FULL AND FAIR HEARING.

The brief of the Commission totally fails to meet the argument of all of the Petitioners in this cause that the failure to issue a subpoena to the Pipeline Manager of El Paso Natural Gas Company precluded Petitioners from a full and fair hearing. The Commission brief dismisses this fundamental argument with a one sentence comment that "plainly there is no valid objection if the Commission accepts proffered evidence at face value" (Commission Brief, p. 12). The Commission did *not* accept the proffered evidence but excluded it and refused to subpoena the witness needed to determine if alternative service could be rendered by El Paso at a cheaper price and in a more dependable manner. This testimony was relevant and material, and the denial of the subpoena was prejudicial error since it deprived Petitioners of the right to a full and fair hearing. As pointed out in the brief of the City and County of San Francisco (p. 12) "the parties to the proceeding before an administrative agency such as the Commission are entitled to: First; Due notice as to the nature and scope of the contemplated inquiry; Second; An opportunity to be heard and present evidence; Third; A full hearing within conformity with the fundamental concept of fairness (Shell Oil Company v. Federal Power Commission, 334 F. 2d. 1002)."

Here the Commission denied Petitioners the opportunity to present relevant and material evidence and therefore

deprived them of the right to a full hearing within the fundamental concept of fairness.

All of the briefs of the opposing parties state that the Commission did not have enough evidence to consider El Paso as an alternative source (Commission Brief, p. 11; Southern California Gas Company, et al, Brief p. 17; Pacific Gas Transmission Brief, p. 20, 21), yet the objection of PGT and others led to the original exclusion of the proffered testimony and the denial of the request for a subpoena decus tecum. As pointed out more fully in our initial brief, *City of Pittsburgh v. Federal Power Commission,* 237 F. 2d 741, *Scenic Hudson Preservation Conference, et al v. Federal Power Commission,* 354 F. 2d 608, and *Michigan Consolidated Gas Company v. FPC, 283* F. 2d 204, Cert. denied, 364 U.S. 913 (1960), require *at least* that the Commission allow a party to reasonably develop an alternative; and may require that the Commission itself develop the alternative, if the parties are unable to do so.

The Commission brief correctly points out (p. 18) "While the Commission has no power to require a pipeline to enlarge its facilities, we have no doubt that the aggressive companies serving the California market would take any reasonable opportunity to avail themselves of such an opportunity if the Commission indicated its preference for service by a different company." Similarly, Pacific Gas Transmission Company's brief is correct (p. 21 and 22) when it states "furthermore, the cited cases stand for the common sense principle that when there is an apparent possibility of injury to the public interest arising from the granting of the applications applied for, reasonable alternative proposals should be considered."

The forestalling by the Commission of Petitioners opportunity to present such an alternative was prejudicial er-

ror and requires the remand of this proceeding for further consideration by the Commission.

II.

ON THE PRESENT RECORD IT IS IMPOSSIBLE TO ESTABLISH THAT THE PROPOSED PACIFIC GAS TRANSMISSION IMPORTS ARE THE BEST, CHEAPEST, AND MOST DEPENDABLE SUPPLY AND REQUIRED BY THE PUBLIC CONVENIENCE AND NECESSITY.

The briefs of the Commission, PGT, and the Southern California Companies devote most of their argument to an attempt to establish at what price El Paso could deliver 200,000 Mcf per day to Pacific Gas and Electric. The brief of Southern California Gas Company, et al, states that by virtue of their (Southern Companies) "knowledge of the underlying facts they may be of aid to this Court" in determining the actual price of El Paso's deliveries (Southern Companies, et al, Brief, p. 3).

Their conclusion on this point was that the "range of incremental cost (from El Paso) is 25.7 cents and upward which is much higher than the incremental cost to PG&E of 22.6 to 23.6 cents per Mcf for the new PGT gas" (Southern Companies, et al, Brief p. 16). The Commission brief also reached a similar conclusion, stating "the difference in the total costs of the two supplies would be the incremental cost to PG&E of an additional 200,000 Mcf from El Paso, which is on an average basis of 25.7¢ per Mcf . . ." (Commission Brief, p. 15). On the other hand Pacific Gas Transmission Company contends that the El Paso gas will cost at least 27.75 cents per Mcf, stating "the cost to PG&E of additional volumes to El Paso is El Paso's "G" rate which as shown above is 29.74 cents

per Mcf but could possibly be reduced to about 27.75 cents per Mcf" (PGT Brief, p. 18).

These Petitioners contend that the evidence in the hearing below indicated that the incremental cost from El Paso was 22 cents, and quoted from PGT's own witness, who under cross-examination by El Paso stated the El Paso cost at the California border at Topock, was 22 cents per Mcf. The actual price can only be determined from El Paso witnesses.

It is significant that the staff of the Federal Power Commission who handled this case before the hearing examiner also reached the conclusion that El Paso gas is cheaper. The Commission staff brief on the initial submission to the hearing examiner quoted the same testimony of the Pacific Gas Transmission's witness and concluded (p. 38)

> "It appears from the testimony of Pacific Gas' Witness Frank that El Paso Natural Gas Company's overall unit costs for gas delivered to California *have an edge* even over the incremental unit cost showing submitted in these proceedings by Pacific Gas with respect to its Canadian Gas under this proposal." (Emphasis added)

The cost to Pacific Gas & Electric of an El Paso increment is unknown. When El Paso's two best customers in California disagree on this price, these Petitioners and the Commission trial staff can hardly be blamed for accepting the testimony of the PGT witness at face value. The fact remains, however, that the best and only way to determine that price is to have the actual testimony of a live El Paso witness subject to cross-examination. This the Commission refused to allow.

Even if we did accept the estimate in the PGT brief that the incremental cost of an El Paso supply might be a mini-

mum of 27.75 cents per Mcf, this would not establish that the PGT supply is cheaper. The PGT figures for its supply are based on certain assumptions by Witness Blasdale, all aimed at favoring lower unit cost, and some of which have already proved erroneous.

Here again, the Commission staff counsel who handled this proceeding before the hearing examiner analyzed the incremental cost of the gas proposed to be delivered by PGT to PG&E. The Commission staff stated on original submission to the hearing examiner (Brief, p. 36, emphasis again added).

> "In computing the unit cost of gas to be delivered at the Oregon-California Border to PG&E the witness Blasdale necessarily had to make certain assumptions. He assumed the following conditions:
>
> "1. That there would remain a fixed rate of exchange of .925 American cents for each Canadian dollar; 2. *That there would be no increase in the price of purchased gas as a result of a price renegotiation under the gas purchase contracts;* 3. That there would be no new or increased Canadian taxes; 4. That no minor replacements or repairs would have to be made because of breakdown; 5. That Alberta and Southern would not have to pay for compression in connection with its purchases of gas in the Province of Alberta; 6. That the life of the project would not be further increased as a result of new export license for additional gas; 7. That labor and operational costs would remain at the same level through 1970; 8. That delivery by all the individual lines that are associated in this integrated project would be at a 100% load factor (Tr. 1313-1316).
>
> *"Most of the assumptions made by Mr. Blasdale in his unit cost of gas computations appear to be those that would favor lower unit costs.*

"In the computation of these unit costs Mr. Blasdale was also able to take advantage of investment tax credit to the following extent:

"$165,000 in the year 1967; $321,000 in the year 1968; $331,000 in the year 1969 and $152,000 in 1970 (Tr. 1325).

"The availability of investment tax credit is also a factor depending on time and circumstance that can be utilized to reflect lower unit costs."

The above illustrates that these Petitioners may have erred in relying on the 22 cent price for El Paso gas, but the suggested incremental PGT price of 22.6 to 23.6 is not precisely accurate either. The El Paso gas at 27.75 cents per Mcf may still be far cheaper during the life of the permanent certificate than the PGT gas, at a price which *no one can compute after July 1, 1968.*

As emphasized in our initial brief, over 86% of both the old and new gas received from PGT will be subject to an indefinite escalation clause providing for a complete unlimited renegotiation effective July 1, 1968. The initial staff brief states that as a result of the certification of this proposal 507,000 Mcf per day of the total 615,000 Mcf per day would be subject to indefinite escalation provisions (Staff Initial Brief, p. 32), and states "It also affords producers in the Province of Alberta selling into the American market certain advantageous privileges that his counterpart in the United States is unable to enjoy" (Staff Brief, p. 32).

The reasonable concern of the staff counsel in the administrative proceeding must be contrasted with the attitude expressed in the Commission Brief before this Court where it is said (Commission Brief, p. 22) "While the Commission could refuse to approve any project based on

contracts including any indefinite price changing provisions, this would be more restrictive contractually than the treatment of domestic producers." This statement borders on absurdity, because it indicates the Commission may not take action to protect consumers for fear of slightly favoring United States producers.

The Commission's brief in these proceedings states that domestic producers may renegotiate their contracts every five years, just as Canadian producers will do under the producer contracts in this case. In truth, however, any renegotiation by U.S. producers must remain below the area price previously established by the Commission. Canadian producers have no such limitations in the contracts before this Court.

The Commission staff counsel during the proceedings below recognized that the Canadian contracts would be held to be contrary to the public convenience and necessity in the United States, saying (Staff Initial Brief, p. 30):

> "Hence, one troublesome issue arising from these proceeding relates to what, if anything, should be done because of the fact that approximately 50 percent of the reserves tendered in support of the additional volumes proposed to be imported from Canada are subject to what this Commission has categorized as indefinite escalation clauses that are contrary to the public convenience and necessity in the United States."

The Witness Blair also testified to the fact that he is not aware of any ceiling or specific price that Alberta and Southern was limited to in connection with its purchase of gas because of activity of regulatory authorities in the Province of Alberta (R. p. 370).

The Commission brief filed with this Court states that the Commission considered the indefinite escalation pro-

visions and determined that "the contingency of unknown price increases sometime in the future was outweighed by the immediate savings to American consumers when the proposed sales commence" (Commission Brief, p. 22-23). The immediate savings mentioned will be short-lived however, because the unlimited renegotiation begins on July 1, 1968, and the permanent certification herein reviewed by this Court will extend to October 31, 1989. California consumers may rue the exchange of a year and a half of immediate savings at a cost of being bound for 21 years to whatever price Canadian producers choose to exact. The Commission brief also indicates that the Commission desired to preclude any evidence of El Paso's ability and willingness to serve this market, because El Paso would not be able to commence delivers by November 1, 1966 (Commission Brief, p. 18). Here again, a delay of a few months might prevent the pushing of California consumers into a trap for 21 years of indefinite gas costs.

The Commission Brief (p. 11) chides TIPRO, et al, by saying "we suggest that TIPRO's argument that a market was not shown to exist is inconsistent with its basic position that Texas gas, rather than Canadian gas, should be used to meet PG&E's present market needs."

The basic position of TIPRO, et al, is that PG&E failed to establish that its present market needs are compelling enough to require immediate importation of the Canadian

supply. As pointed out in our initial brief, PGT's Witness Frank stated there would be no deficiency in peak day demands prior to 1968-1969 (R. 1162), even without the importation of this Canadian gas. He testified that the interruptible industrial requirement of PG&E had been satisfied 100% during 1963 and 1964, and 98% of PG&E's requirements for its own steam electric generating plants was satisfied in 1965, again without the Canadian importation (R. 1191).

If the desires of the interruptible customers, whether industrial or steam electric, are to be met without interruption, then there is an immediate market for the Canadian imports. We submit, however, that by interrupting service to the interruptible customers, PG&E could well wait to determine its source of new gas, at least until the outcome of the Canadian renegotiation sessions in July, 1968. If there is an immediate need for supplying this market, then the ability of the alternative supplies to meet this need can be immediately discovered on remand, if required witnesses can be subpoenaed.

CONCLUSION

It is submitted that Respondent has not met its obligation under the Natural Gas Act to determine if this application is required by the present and future public convenience and necessity.

These Petitioners respectfully submit that this Honorable Court should set aside Commission Opinion No. 495 and its accompanying orders, particularly including the order of December 17, 1965, and remand this matter to the Commission with instructions requiring admission of the evidence previously excluded and to determine if the facilities and importation proposed in such application are in the public interest and required by the present and future public convenience and necessity.

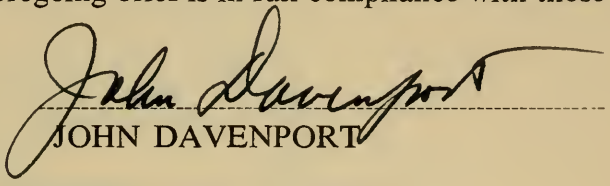
Respectfully submitted,
TEXAS INDEPENDENT PRODUCERS & ROYALTY OWNERS ASSOCIATION
WEST CENTRAL TEXAS OIL AND GAS ASSOCIATION
PERMIAN BASIN PETROLEUM ASSOCIATION

By _____
JOHN DAVENPORT
Attorney for above Petitioners
902 International Life Building
Austin, Texas 78701

February 20, 1967

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



JOHN DAVENPORT

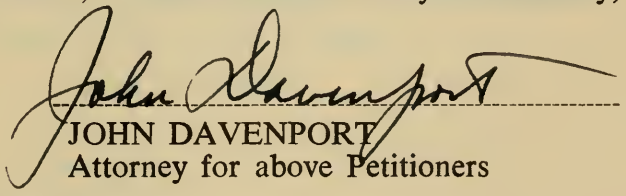
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing upon the following party:

Howard E. Wahrenbrock,
Solicitor
Federal Power Commission
441 G Street, N.W.
Washington, D.C. 20425

and all parties to the proceeding.

Dated at Austin, Texas this the 20th day of February, 1967.



JOHN DAVENPORT
Attorney for above Petitioners